FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

OFFICE OF ADMINISTRATIVE LAW JUDGES
1331 Pennsylvania Avenue, NW, Suite 520N
Washington, DC 20004

FEB 13 2019

GABRIEL SILVA, Complainant, v. ROCKWELL MINING, LLC, BLACKHAWK MINING, LLC, BLACK OAK MINING, LLC, Respondents.	DISCRIMINATION PROCEEDING Docket No. WEVA 2018-0565-D MSHA No. HOPE-DC-2018-02 Mine: Black Oak Mine Mine ID: 46-09152

ORDER DENYING RESPONDENTS' MOTION FOR SUMMARY DECISION

Before: Judge Feldman

The captioned discrimination proceeding is before me based on a discrimination complaint filed pursuant to section 105(c)(3) of the Federal Mine Safety and Health Act of 1977, as amended, 30 U.S.C. § 815(c)(3) (the "Act"), by Gabriel Silva against Rockwell Mining, LLC, Blackhawk Mining, LLC, and Black Oak Mining, LLC (collectively, "Respondents"). The record reflects that Silva was employed at all relevant times as a utility man by Black Oak Mine, LLC ("Black Oak") at its facility located in Wharton, West Virginia. Compl. at 1. Silva alleges, in essence, that his three day suspension that followed his refusal to mix a Quikrete dry sealant because of his concern regarding the adequacy of the inhalation protection provided to him by Black Oak violates the antidiscrimination provisions of section 105(c)(1) of the Act.[1] Compl. at 2-4. On December 7, 2018, the Respondents filed a Motion for Summary Decision ("Respondents' Motion") seeking the dismissal of Silva's complaint. Silva filed an opposition to the Respondents' Motion on December 19, 2018 ("Complainant's Opposition"). The United Mine Workers of America ("UMWA") represents Silva in this matter. *Id.* at 4.

I. Background

Silva asserts that he refused to mix water with powdered dry sealant because of his concern that the product is a lung irritant. Compl. at 2-3. Silva alleges that his refusal was due to his concern that the inhalation protection provided by the paper Moldex 2300N95 respirator, supplied by Black Oak, was inadequate. *Id.* at 3. Silva further alleges that his request for a 3M filtered respirator that contained a rubber seal, that he believed would provide better inhalation protection, was denied by Black Oak. Compl. Opp., Ex. A at 2-3. In contrast, Black Oak alleges that the inhalation protection provided by the paper Moldex 2300N95 respirator was sufficient because it was the respirator recommended by Quikrete, the manufacturer of the powdered sealant. Resp't Mot. at 1-2.

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[1] Section 105(c)(1) provides in pertinent part, "No person shall discharge or in any manner discriminate against [a miner] . . . because such miner . . . made a safety complaint related to this Act." 30 U.S.C § 815(c)(1).

II. Analysis

a. Prima Facie Case

Section 105(c)(1) of the Act prohibits a mine operator from discriminating against a miner because the miner has engaged in safety-related protected activity. 30 U.S.C. §815(c)(1). To establish a prima facie case under section 105(c)(1) of the Act, it must be shown, by a preponderance of the evidence, that the complainant engaged in safety-related protected activity, and, that the claimant was the victim of adverse action that was motivated, at least in part, by that activity. *Jeffrey Pappas v. Calportland Co. and Riverside Cement Co.*, 40 FMSHRC 664, 668 (May 2018) (citing *Turner v. Nat'l Cement Coal Co. of California*, 33 FMSHRC 1059, 1064-67 (May 2011); *Sec'y of Labor on behalf of Pasula v. Consolidation Coal Co.*, 2 FMSHRC 2786, 2799 (Oct. 1980); *Sec'y of Labor on behalf of Robinette v. United Castle Coal Co.*, 3 FMSHRC 803, 817-18 (Apr. 1981).

b. Protected Work Refusal

The Commission has addressed the evidentiary criteria for determining whether a work refusal is protected activity as contemplated by section 105(c)(1) of the Act:

> The Mine Act grants miners the right to complain of a safety or health danger or violation, but does not expressly state that miners have the right to refuse to work under such circumstances. Nevertheless, the Commission and the courts have recognized the right to refuse to work in the face of such perceived danger. *See Price*, 12 FMSHRC at 1514; *Cooley*, 6 FMSHRC at 520. In order to be protected, work refusals must be based upon the miner's "good faith, reasonable belief in a hazardous condition." *Robinette*, 3 FMSHRC at 812; accord *Gilbert v. FMSHRC*, 866 F.2d 1433, 1439 (D.C. Cir. 1989). A good faith belief "simply means honest belief that a hazard exists." *Robinette*, 3 FMSHRC at 810. Consistent with the requirement that the complainant establish a good faith, reasonable belief in a hazard, "a miner refusing work should ordinarily communicate, or at least attempt to communicate, to some representative of the operator his belief in the safety or health hazard at issue." *Secretary of Labor on behalf of Dunmire v. Northern Coal Co.*, 4 FMSHRC 126, 133 (Feb. 1982).
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> Once it is determined that a miner has expressed a good faith, reasonable concern about safety, the analysis shifts to an evaluation of whether the operator addressed the miner's concern "in a way that his fears reasonably should have been quelled." *Gilbert*, 866 F.2d at 1441; *see also Secretary of Labor on behalf of Bush v. Union Carbide Co.*, 5 FMSHRC 993, 998-99 (June 1983); *Thurman v. Queen Anne Coal Co.*, 10 FMSHRC 131, 135 (Feb.

> 1988), aff'd mem., 866 F.2d 431 (6th Cir. 1989). A miner's continuing refusal to work may be deemed unreasonable after an operator has taken reasonable steps to dissipate fears or ensure the safety of the challenged task or condition. *See Bush*, 5 FMSHRC at 998-99.

Bryce Dolan v. F & E Erection Co., 22 FMSHRC 171, 177 (Feb. 2000).

c. Summary Decision

Commission Procedural Rule 67(b), which tracks the provisions of summary judgment Rule 56(a) of the Federal Rules of Civil Procedure, provides:

> A motion for summary decision shall be granted only if the entire record, including the pleadings, depositions, answers to interrogatories, admissions, and affidavits, shows: (1) That there is no genuine issue as to any material fact; and (2) That the moving party is entitled to summary decision as a matter of law.

29 C.F.R. § 2700.67(b); *see* Fed. R. Civ. P. 56(a).

The Commission has cautioned against the broad approval of motions for summary decision, noting that, "[s]ummary decision is an extraordinary procedure. If used improperly it denies litigants their right to be heard." *Missouri Gravel Co.*, 3 FMSRC 2470, 2471 (Nov. 1981) (footnote omitted). The Respondents, as the parties moving for summary decision, bear the burden of demonstrating there are no genuine disputes as to material facts. *See Kenamerican Res., Inc.*, 38 FMSHRC 1943, 1946 (Aug. 2016) (citing *Celotex Corp v. Catrett*, 477 U.S. 317, 323 (1986); *Adickes v. S.H. Kress & Co.*, 398 U.S. 144, 157 (1970)). If the Respondents satisfy their burden, the focus shifts to whether Silva, as the non-movant party, has established a genuine dispute as to material fact. *Id.* (citing *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 256 (1986); *Scott v. Harris*, 550 U.S. 372, 380 (2007); *Matsushita Elec. Indus. Co. v. Zenith Radio Corp.*, 475 U.S. 574, 586-587 (1986)). The inferences to be drawn from the underlying facts allegedly supporting the motion must be viewed in the light most favorable to the party opposing the motion. *Id.* (citing U.S. v. Diebold, Inc., 369 U.S. 654, 655 (1962)).

Disposition of the Respondents' Motion for Summary Decision requires identification of several outstanding issues of material fact that must be viewed in the light most favorable to Silva. Namely: (1) whether Silva's work refusal was based on a reasonable good faith belief that the respiratory protection provided by Black Oak did not adequately protect him from the potentially toxic inhalation hazard posed by the mixing of the powdered dry sealant; (2) whether Silva adequately communicated his inhalation concerns to Black Oak; and (3) whether Black Oak responded to Silva in a manner that should have adequately quelled Silva's fears. Given unresolved nature of these outstanding questions of material fact, the Respondents' Motion for Summary Decision must be denied.

d. Proper Parties in this Matter

The record reflects that Blackhawk Mining, LLC, is the parent company of Rockwell Mining, LLC, and Black Oak Mining, LLC. Compl. Opp., Ex. C at 1. The Respondents assert, in essence, that Blackhawk Mining, LLC, and/or Rockwell Mining, LLC, are not proper parties as they do not operate the Black Oak Mine, and are not Silva's employer. Resp't Mot. at 2, n. 1. I construe the Respondents' assertion as a motion to strike Black Hawk Mining, LLC, and/or Rockwell Mining, LLC, as Respondents in this proceeding. The proper inquiry in a discrimination proceeding is whether a named respondent has the ability to make a complaining miner whole. *See Sec'y of Labor o/b/o Shemwell v. Armstrong Coal Co., Inc.*, et al., 34 FMSHRC 894, 898-99 (April 2012) (ALJ) (Noting that the "legislative history of the Mine Act reflects Congress' concern that effective relief must be afforded to victims of discrimination."). It is doubtful that Black Oak Mining, LLC, is incapable of providing the relief sought by Silva, namely the reimbursement of lost pay as a consequence of Silva's three day suspension. However, the issue of whether Black Oak Mining, LLC, should be the sole Respondent in this proceeding shall be held in abeyance to afford the parties an opportunity to address this issue in their post-hearing briefs.

ORDER

In view of the above, **IT IS ORDERED** that the Respondents' Motion for Summary Decision **IS DENIED** and that this matter shall be scheduled for hearing. The hearing date and location will be specified in a subsequent order.

IT IS FURTHER ORDERED that the Motion to Strike Black Hawk Mining, LLC, and/or Rockwell Mining, LLC, at this early phase of this proceeding **IS DENIED**.

Jerold Feldman
Administrative Law Judge

Distribution:

Gabriel Silva, P.O. Box 111, Danville, WV 25053

Laura P. Karr, Esq., United Mine Workers of America, 18354 Quantico Gateway Drive, Suite 200, Triangle, VA 22172 lkarr@umwa.org

Jonathan R. Ellis, Esq., Steptoe & Johnson, PLLC, Eighth Floor, Chase Tower, P.O. Box 1588, Charleston, WV 25326 jonathan.ellis@steptoe-johnson.com

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